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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 110

THE ALTON RAILROAD COMPANY, et al.,
Appellants,
vs.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and JOHN P. FLEMING,
An Individual, Doing Business as John P. Fleming Driveaway Service,
Appellees

On Appeal from Decree of a Specially Constituted District Court of the United States for the Eastern District of Michigan, Southern Division

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BRIEF OF APPELLEE JOHN P. FLEMING

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Dated: Detroit, Michigan,
December 10, 1941.

INDEX

	Page
Opinions below	1
Jurisdictional statement	1
Statement of case	2
Argument	2-41
I. The Interstate Commerce Commission order was within the scope of the powers vested in the Commission by Congress and constituted a sound exercise of the Commission's administrative discretion	2-30
A—The Commission had power to issue the order	2-3
B—Determination of the scope of the order was delegated to the Commission	4-5
C—Differentiation between classes of carriers was not only authorized but required	5-6
D—The Commission had substantial evidence before it upon which to base the order	7-10
1—Fleming was a common carrier of special commodities over irregular routes within a territory	7
2—Operations on or about the statutory "Grandfather" date were conducted in all states embraced in the grant of authority	7-8
3—These operations were "bona fide" in character	8-10
E—The order was founded upon reasonable standards consistently applied	10-21
1—Broad operating authority granted to specialized haulers	10-16

Page

2—Operations recognized as "bona fide" in absence of concealment, fraud or wilful violation of law 16-21

F—No erroneous construction of the Act or faulty interpretation of its provisions is evident 22-29

1—"Grandfather" cases warrant liberal interpretation of the expression "within the territory" 22-24

2—"Territory" not construed to mean "states" 24-26

3—Lawfulness recognized as an element of a "bona fide operation" 26-29

G—A full, fair and impartial hearing was afforded 29-30

II. The District Court decree, insofar as it adopts the findings and affirms the conclusions of the Commission, constituted full judicial review of the administrative action in sound conformity with established principles of administrative law 31-41

A—Full judicial review of the administrative action was afforded 31-32

B—Validity of the Commission's action, except as modified, was affirmed 32-35

C—Established principles of administrative law were observed 35-41

1—Much weight should be given to Commission's construction of the Act 35-36

2—The Commission's findings of fact should be conclusive 36-37

3—The judicial function is exhausted when a rational basis for the Commission's conclusion is found 37

Page

4—It is not the function of the Court to substitute its judgment for that of the Commission 38

5—A contrary ruling would establish a precedent for judicial review of all "Grandfather" orders 39-41

Conclusion 42

TABLE OF AUTHORITIES CITED

Cases

A. E. McDonald Motor Freight Lines, 21 M. C. C. 658 20

Carolina Freight Carriers Corp. v. U. S., 38 F. Supp. 549 23

D. L. Wartena, 4 M. C. C. 619..... 20

Earl W. Slagle, 2 M. C. C. 127.....16, 17, 18

East Tenn. Etc. R. R. Co. v. I. C. C., 181 U. S. 1.... 40

Eichholtz v. Public Service Comm., 306 U. S. 268.... 27

Ex Parte No. M. C. 10, 2 M. C. C. 703..... 10, 11

George Cassens & Sons, 1 M. C. C. 771..... 12

Illinois Central R. R. Co. v. I. C. C., 206 U. S. 441... 40

Interstate Commerce Act, Part II—

Section 202 a..... 3

Section 204 a-1..... 3

Section 204 a-6..... 3

Section 204 b..... 5, 10

Section 206 a..... 4, 8

Section 207 b..... 24

Section 208 a..... 6

Interstate Commerce Commission v. Union Pacific, 222 U. S. 541..... 37

Jay Rountree, 22 M. C. C. 355..... 20

Page

Kenosha Auto Transport Corp., 24 M. C. C. 753.... 16
L. C. Robertson, 8 M. C. C. 32..... 12
Loving v. U. S., 32 F. Supp. 464.....5, 8, 22, 36
Louisville & Nashville R. R. Co. v. Behlmer, 175 U. S. 648 40
Manufacturers Ry. Co. v. U. S., 246 U. S. 457..... 8
McDonald v. Thompson, 305 U. S. 263.....20, 28, 29
Mississippi Valley Barge Co. v. U. S., 292 U. S. 282.. 8, 37
Motor Carrier Act, 1935..... 2
Noeding Trucking Co. v. U. S., 29 F. Supp. 537..... 41
Norwegian Nitrogen Products Co. v. U. S., 288 U. S. 294 36
Pennsylvania Co. v. U. S., 236 U. S. 351..... 8
Reliance Trucking Co., Inc., 4 M. C. C. 954..... 14
State ex rel. Great Northern v. Dept. Pub. Wks., 219 Pac. 878 19
Swayne & Hoyt, Ltd., v. U. S., 300 U. S. 287..... 8
The Los Angeles Switching Case, 234 U. S. 294..... 38
The New England Divisions Case, 261 U. S. 184.... 37
United States Code, Title 49—
Section 301 2
Section 302 a..... 3
Section 304 a-1..... 3
Section 304 a-6..... 3
Section 304 b..... 5, 10
Section 306 a.....2, 3, 4, 8
Section 307 b..... 24
Section 308 a..... 6
United States v. American Trucking Assns., Inc., 60 S. Ct. 1059..... 36
United States v. Louisville & Nashville R. R. Co., 235 U. S. 314..... 41

Page

United States v. Maher, 307 U. S. 148.....4, 6, 35, 36
Virginia Ry. Co. v. U. S., 272 U. S. 658..... 36
Ware v. Hylton, 3 U. S. 199..... 16
Watson Bros. Trans. Co., Inc., 24 M. C. C. 679..... 20
Western Paper Makers Chemical Co. v. U. S., 271 U. S. 269..... 8, 37

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OPINIONS BELOW

The Opinion of the specially constituted District Court appears in 36 F. Supp. 898 (R. 29). The Report of the Interstate Commerce Commission, Division 5, appears in 8 MCC 469 (R. 8).

JURISDICTIONAL STATEMENT

This case comes to the Supreme Court by direct appeal, 28 U. S. C. A. 345 (4), from a decree of a specially constituted United States District Court of Three Judges 28 U. S. C. A. 47.

STATEMENT OF CASE

Appellants' statement of the case is accepted without correction, pursuant to Rule 27, Revised Rules of the Supreme Court.

ARGUMENT

I.

THE INTERSTATE COMMERCE COMMISSION ORDER WAS WITHIN THE SCOPE OF THE POWERS VESTED IN THE COMMISSION BY CONGRESS AND CONSTITUTED A SOUND EXERCISE OF THE COMMISSION'S ADMINISTRATIVE DISCRETION

A. The Commission Had Power to Issue the Order.

The Motor Carrier Act, 1935, now Part II of the Interstate Commerce Act (U. S. Code Title 49 Sec. 301), approved August 9, 1935, effective October 15, 1935, regulated motor carrier transportation in interstate commerce and prohibited such transportation by motor common carriers until they had received from the Interstate Commerce Commission a certificate of public convenience and necessity. Under the "grandfather" provisions of the Act (U. S. Code Title 49, Sec. 306(a)) a motor common carrier engaged in "*bona fide*" operations on June 1, 1935, could obtain a certificate of public convenience and necessity upon proof of such "*bona fide*" operations and upon filing of an application in conformity with the regulations of the Commission.

As might be expected, Congress delegated the administration of the Act to the Interstate Commerce Commission, an administrative body created by Congress for the express purpose of regulating interstate commerce.

"The regulation of such transportation and of the procurement thereof, and the provision of facilities therefor is hereby vested in the Interstate Commerce Commission."

Interstate Commerce Act, Part II, Sec. 202(a)
U. S. Code, Title 49, Sec. 302(a).

"It shall be the duty of the Commission to regulate common carriers by motor vehicle as provided in this part * * *."

Interstate Commerce Act, Part II, Sec. 204(a) (1)
U. S. Code, Title 49, Sec. 304(a) (1).

"It shall be the duty of the Commission to administer, execute and enforce all provisions of this part to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration;"

Interstate Commerce Act, Part II, Sec. 204(a) (6)
U. S. Code, Title 49, Sec. 304(a) (6).

Express authority was given to the Interstate Commerce Commission to issue certificates of public convenience and necessity under the "grandfather clause" of the Act. Where a motor common carrier applies for a certificate of public convenience and necessity under the "grandfather clause" of the Act, upon due proof of *"bona fide"* operation on the statutory grandfather date.

"The Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings."

Interstate Commerce Act, Part II, Sec. 206(a)
U. S. Code, Title 49, Sec. 306(a).

B. Determination of the Scope of the Order Was Delegated to the Commission.

In deciding an application filed by a motor common carrier for a certificate of public convenience and necessity under the "grandfather clause" of the Act, it was necessary for the Commission to determine that common motor carrier transportation operations were being conducted on June 1, 1935, and that such operations were *"bona fide"* in character. The determination of the geographical or territorial scope of such operations clearly involves a question of fact which is within the province of the Commission's administrative discretion. The determination of whether the operations were *"bona fide"* in character also appears to involve a question of fact since the "grandfather clause" provision states that registration under any code of fair competition shall be evidence of *"bona fide"* operation.

> "and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of 'bona fide' operation to be considered in connection with the issuance of such certificate."
>
> *Interstate Commerce Act,* Part II, Sec. 206(a) *U. S. Code* 49, Sec. 306(a).

> " By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission."
>
> *U. S. v. Maher,* 307 U. S. 148, 153.

"It is further held that the determination of controverted matters of fact arising in whether a carrier was in bona fide operation within the immunizing period of the Statute, was entrusted to the Interstate Commerce Commission. See, *United States of America v. Maher, supra.* This court is, therefore, powerless to hear the evidence or to review the proof submitted to the Commission in the instant case."

Loving v. U. S., 32 F. Supp. 464.

C. Differentiation Between Classes of Carriers Was Not Only Authorized But Required.

In passing this Act to regulate interstate transportation by motor carriers, Congress clearly recognized that motor common carriers differed from one another in the nature and type of transportation service rendered to the shipping public and not only gave to the Commission authority to make a reasonable classification of motor carriers but also imposed upon the Commission a duty to determine, recognize and apply differentiation between carriers of differing types.

"The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term 'common carrier by motor vehicle,' or 'contract carrier by motor vehicle,' as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest."

Interstate Commerce Act, Part II, Sec. 204(b) *U. S. Code,* Title 49, Sec. 304(b).

In the "grandfather clause" of the Act (cited *supra*) Congress by express language differentiated between operations on the statutory "grandfather" date *"over the route or routes or within the territory* for which application is made." (Emphasis supplied.) Congress further provided that any certificate issued under the "grandfather clause" of the Act.

> "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate;"
>
> *Interstate Commerce Act,* Part II, Sec. 208(a). *U. S. Code,* Title 49, Sec. 308(a).

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini."
>
> *U. S. v. Maher,* 307 U. S. 148.

D. The Commission Had Substantial Evidence Before It Upon Which to Base the Order.

1. Fleming was a common carrier over irregular routes within a territory.

Fleming's application to the Interstate Commerce Commission for operating authority under the "grandfather clause" of the Act and his sworn testimony at public hearing on such application clearly showed that he was a common carrier of special commodities, namely automotive vehicles over irregular routes within a broad territory (R. 49, 51, 53, 83, 84).

2. Operations on or about the statutory "grandfather" date were conducted in all states embraced in the grant of authority.

The sworn allegations in Fleming's "grandfather clause" application indicated that common carrier operations in the transportation of special commodities were being conducted by Fleming on the statutory "grandfather" date to some point or points in all of the states embraced in the Commission's grant of authority (R. 51, 52, 53). These allegations were substantiated by Fleming's sworn testimony at public hearing on the application (R. 84). This testimony was further substantiated by the introduction in evidence of original shipping documents showing service to one or more points in each state embraced within the Commission's grant of authority, either shortly before or shortly after June 1, 1935, and in most instances both before and after the statutory "grandfather" date (R. 92-96, 109-118).

> "The hearing of evidence is an exclusive function of the Commission and it may disbelieve or disregard any evidence which to it seems unconvinc-

ing; it may give as much or as little weight to evidence as it deems proper. See, *Swayne & Hoyt Ltd., v. United States,* 300 U. S. 287; *Mississippi Valley Barge Co. v. United States,* 292 U. S. 282; *Western Paper Makers Chemical Co. v. United States,* 271 U. S. 269; *Manufacturers Ry. Co. v. United States,* 246 U. S. 457; *Pennsylvania Co. v. United States,* 236 U. S. 351. But, it must not act arbitrarily or capriciously in the considering of evidence presented to it."

Loving v. U. S., 32 F. Supp. 464.

3. Fleming's operations were "bona fide" in character.

Fleming's application for operating authority indicated that he was registered under a code of fair competition, namely the Trucking Code, on December 31, 1934 (R. 55). By the terms of the Act, such registration was some evidence of "*bona fide*" operations to be considered in granting the authority requested *(Interstate Commerce Act,* Part II, Sec. 206(a); *U. S. Code,* Title 49, Sec. 306(a)). Fleming testified at public hearing on his application that he had complied with all requirements that had been made upon him by the various state regulatory authorities (R. 85) and proceeded to state in detail the nature of his actions in complying with state regulatory legislation (R. 85-92). Fleming introduced into evidence documents indicating the manner in which compliance with state laws was made (R. 87-91). Fleming also testified on cross examination that before starting a movement into a new territory it had been his policy to inquire as to applicable state laws and that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a law of the state pertaining to his operations or to a rule or regulation of a state regulatory body (R. 106, 107).

Question has been raised by Appellants as to the *"bona fide"* character of Fleming's operations because in the State of Oregon he held contract carrier authority while he applied for and received from the Interstate Commerce Commission common carrier authority. Further question is raised by Appellants as to this issue because Fleming admitted under cross examination that he represented himself to be the owner of vehicles when they were passing through Nebraska despite his conclusions of law on cross examination that he was not the owner of such vehicles. Further question was raised in the court below as to the lawfulness of Fleming's operations in Missouri because of his failure to obtain operating authority under an Act which was not construed to cover the transportation of motor vehicles by driveaway until December 1935, six months after the statutory "grandfather" date (R. 109).

It should be noted that Fleming, in his direct case, offered testimony and evidence indicating that some service was rendered to all states embraced within the Commission's grant of authority and that he had made some effort to comply with the regulatory laws in each state through which operations were conducted. No witness was offered to refute Fleming's testimony and no evidence was introduced to contradict Fleming's documentary evidence. The only state law introduced at the hearing on Fleming's application was the state law of Missouri and Missouri was the only state represented in opposition at the hearing. Neither Missouri nor any other state took any affirmative action in opposition to the Commission's grant of authority subsequent to the hearing on Fleming's application and no motor carrier protested or contested the Commission's action. The sole strength of appellants' case is predicated upon the alleged weakness of Fleming's case and appellants' sole basis for attack so

far as the evidence is concerned depends upon cross examination of Fleming for the production of inconsistent statements or the eliciting of legal conclusions which may not square with his statements of fact.

E. The Order Was Founded Upon Reasonable Standards Consistently Applied.

1. Broad operating authority granted to specialized haulers:

Pursuant to the authority granted to it by Congress in the Act (Interstate Commerce Act, Part II, Sec. 204(b); U. S. Code, Title 49, Section 304 (b)) the Commission issued a classification report, Ex Parte No. MC 10, on August 9th, 1937, classifying motor carriers of property on the basis of the type of service and method of transportation offered to the shipping public. The Commission indicated that its classification report was based upon a substantial investigation and study of the practices of the industry and that the report was promulgated under the theory that a practical classification

> "Must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome to the industry. The public interest requires that the way be left open for normal, healthy growth. Any plan which would retard such growth would defeat the purpose of the Act. We have been fully cognizant of these facts throughout the course of our study of this matter."
>
> *Ex Parte No. MC. 10*, 2 M. C. C. 703 (704).

On the basis of its study and investigation the Commission recognized that "carriers of motor vehicles" constituted a major division of the industry and placed such carriers in

a special category comparable to the special category in which other specialized transporters were placed, as for example carriers of household goods, carriers of heavy machines, carriers of liquid petroleum products and so forth. In discussing carriers of motor vehicles the Commission stated:

> "Note.—The transportation of new automobiles, trucks, and trailers is usually a class C-9 movement (irregular route, radial service). The transportation of used automobiles, trucks, and trailers and new or used chassis, bodies and automotive display vehicles is usually a class D-9 movement (irregular route, non-radial service). In either case, the operation may be that of a common or contract carrier. When classified as a class D-9 movement, the scope of the operation is territorial in character and includes the transportation of motor vehicles to, from, and between unlimited points of origin and unlimited points of destination within the territory served by such carrier, over irregular routes, in either direction, outbound, or back haul, or in cross movements."
>
> *Ex Parte No. M. C. 10,* 2 M. C. C. 703 (712).

Fleming's operations being clearly within the classification of "carriers of motor vehicles," it was apparent that the authority to be issued to him should conform with the special characteristics above noted. In at least two cases involving carriers of motor vehicles decided by the Commission before the Fleming order was issued the Commission granted broad territorial authority under the theory that this type of carrier was entitled to such authority because of the special characteristics of the transportation service offered to the shipping public.

> "It obviously was not the intent of the Congress that a carrier must have been in physical operation to all points to which such carrier claims to have

rendered service on the exact date specified in the statute. It is apparent that if such were the intent and purpose of the 'Grandfather' clause provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date."

George Cassens & Sons, 1 M. C. C. 771 (774).

"It is readily apparent that, in defining the territorial limits of a service, such as applicant's, involving a single commodity which does not move directly into the smaller towns because of the absence of dealer-agents, and, except in the larger cities, moves only to a single consignee in each of the towns where deliveries are made, a broader grant of authority is appropriate than in the case of services which involve the transportation of numerous commodities moving regularly to all points."

L. C. Robertson, 8 M. C. C. 32 (33).

Consistent with the classification report and in consistency with the standards established in the Cassens and Robertson cases the Trial Examiner in the Fleming case stated:

"It is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are irregular in nature and necessarily so because of the conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended

for, might well destroy applicant's usefulness. The primary test in each case is the requirements of the public. As applicant points out, a restriction of his operation to fixed termini would seriously handicap the conduct of his business and tend to prevent him rendering the type of service which the industry requires. The particular operation requires great flexibility, both as to routes and as to points to be served. Under the circumstances it must be concluded that applicant is entitled under the 'Grandfather' clause to serve all destinations in each of the states for which application has been made without restriction of route."

Examiner A. E. Later's Report (R. 76).

The report of the Commission by Division 5 in the Fleming case also followed the principles established by its classification report and was in conformity with the principles enunciated in the Cassens and Robertson cases. Division 5 of the Commission stated:

"It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the states served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specific points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which automobile manufacturers have established distribution facilities. A manufacturer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1200 vehicles were transported by applicant in the period from Janu-

ary 1934, to June 1935, yet relatively few points were served. This further indicates that applicant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and supporting data based upon which it is estimated that in the year 1935, less than seven per cent of all new automobiles sold in twenty-four western states were transported by the driveaway method.

As basis for authority to serve all points in a state, applicant points out that distribution points are constantly shifted from the standpoint of a state-wide area; dealers accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under Section 206 (a) of the Act, the provisions of which require in substance that the authority granted shall permit a carrier to conduct the *bona fide* operations it was conducting on June 1, 1935. In *Reliance Trucking Co. Inc., Contract Carrier Application*, 4 M.C.C. 954, we said that: 'In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the "Grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "Grandfather" certificates to haul "general commodities," that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "Grandfather" period consistent with the holding out in the natural and normal course of busi-

ness.' It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only through the distribution and sales of such commodities as automotive vehicles.

Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunities of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally."

Commission Report (R. 13 and 14).

Subsequent to the decision in the Fleming case the Commission was still applying these same principles in the decision of "Grandfather" cases involving carriers of motor vehicles. In a later case the Commission said:

"Protestants refer to the rather sporadic showing concerning movements to some of the states and especially to those where only one shipment was shown to have been transported prior to June 1, 1935. They urge that such evidence is insufficient to support a claim of 'Grandfather' rights to all points in the state. Under ordinary circumstances and in dealing with the average type of carrier which transports a number of commodities for the general public, or for a group of shippers from several origin points, protestants' contentions would possess considerable merit. In this instance, however, we are considering a very special type of service, which of necessity depends upon the frequency of demand for the particular commodity

transported. For obvious reasons a motor-vehicle manufacturer could not appoint an indefinite number of dealers or distributors in a given territory. Economic conditions require constant changing of such distribution points, and if applicant were granted operating rights only to those points served previous to June 1, 1935, it would constantly be before us for authority to serve new points. We are of the opinion that the same proof with respect to territory served that might be required of a general-commodity hauler cannot be imposed upon this type of carrier, nor can operations be confined within the same definite limits. Applicant's service was necessarily confined, because of the type of commodities transported, to a very few points compared to the large territory sought, and future operations will be likewise limited. Moreover, applicant has always held itself out to serve any and all points in the states claimed."

Kenosha Auto Transport Corp., 24 M. C. C. 753 (757).

2. Operations recognized as bona fide in absence of concealment, fraud, or wilful violation of law.

Congress failed to define in the Act the precise meaning of the expression "*bona fide* operation." The ordinary dictionary definition of the expression "*bona fide*" means "in good faith" or "without fraud or deceit" or "real, actual, genuine, honestly, openly, sincerely." This Court in the case of *Ware v. Hylton*, 3 U. S. 199 (214), said that the expression signifies a thing done in good faith without fraud or deceit or collusion. There is nothing in the Act which can lead to the belief that Congress used the expression in other than its ordinary sense.

In an early case, *Earl W. Slagle*, 2 M. C. C. 127, the Commission interpreted the expression "*bona fide* operation"

and has consistently followed the principles set forth in the Slagle case in its subsequent determinations. In the Slagle case the applicant sought authority under the "Grandfather" clause of the Act and rail protestants raised an issue as to whether Slagle's operations were in fact "*bona fide.*" After reviewing Slagle's actions with respect to state regulatory laws the Commission stated:

> "Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation, the situation was a most difficult one for the states, which was one of the reasons why their regulatory authorities very generally favored such regulation. The records show that Congress was fully informed in regard to this situation. It might readily, in clear and unmistakable language, have made compliance with the state laws a pre-requisite to rights under the 'Grandfather' clauses, and have indicated how we should determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase '*bona fide* operation,' making registration 'under any code of fair competition' evidence of such operation on June 1 or July 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates, in connection with the phrase '*bona fide* operation.' "
>
> *Earl W. Slagle,* 2 M. C. C. 127 (138).

> "Where the fact of noncompliance with state laws is admitted by an applicant or properly proved to us, we cannot accept protestants' contention that

this fact alone requires denial of an application under the 'Grandfather' clause. The words '*bona fide*' certainly make it necessary to consider also the mental attitude of the offender, for, where good faith is involved, the maxim 'ignorance of the law is no excuse' loses its force. We cannot ignore the facts that it has sometimes been difficult for motor carriers to keep fully informed in regard to the requirements of state laws, that some states have permitted rather general disregard of certain requirements, and that operators might in good faith challenge the validity of some state statutes affecting interstate commerce."

Earl W. Slagle, 2 M. C. C. 127 (140).

The Commission pointed out in the Slagle case that an adoption of the protestants' interpretation of the Act would require the Commission to exercise judicial functions in respect to state laws. In other words, to determine the fact of compliance or non-compliance, it would be necessary for the Commission first, to ascertain what the state law was; second, to construe that law; and third, to apply it as construed to the facts of the case. This would carry the further responsibility of determining whether the law itself was valid. As an illustration the Commission pointed out that Slagle was considered a contract carrier operator in Iowa but the Interstate Commerce Commission determined that he was a common carrier within the terms and provisions of the Interstate Commerce Act.

In the Slagle case the Commission made a finding that the applicant had paid various fees in substantial amounts in several of the states and had encountered various delays in obtaining permits, including delays caused by changes in the state laws, and he had difficulty in determining the extent to which he was subject to some of these laws, if at all. The Commission stated that the evidence established

the general willingness of the applicant to comply with state laws and the exercise of some diligence on his part to effect compliance. The Commission reasoned that to the extent the state laws are properly applicable to Interstate operations they can be enforced by the state and the Commission could assume that they have been and will be so enforced. The Commission also reasoned that one purpose of the use of the expression was probably to deny rights under the "Grandfather" clause to a carrier who, with knowledge of the impending legislation, should make a show of commencing operations, not in pursuance of any well conceived plan of furnishing transportation service, but for the purpose of thereby securing rights to operate having in themselves a money value.

> "As we read the Act, the particular provision now under consideration was intended to give a preference right to all operators in good faith, who had been operating without knowledge that the Legislature would so act, and to deny a preference right to those who, after the Legislature began the consideration of the subject, in bad faith commenced to act for the purpose of forestalling the legislative action."
>
> *State Ex Rel. Great Northern Ry. Co. v. Dept. of Pub. Wks.*, 219 Pac. 878.

After considering the steps taken by Slagle to comply with state regulatory laws the Commission reached the determination as a matter of fact that Slagle's operations were *bona fide* in character because they were openly conducted in an honest manner without concealment, fraud or deceit. The Commission has consistently applied this test in other decisions involving all types of carriers, sometimes arriving at the conclusion that the operations were *bona fide* and at other times arriving at the conclusion that the operations were not.

In the case of *D. L. Wartena*, 4 M. C. C. 619, the evidence indicated that the applicant claimed to be ignorant of state regulatory laws but had been operating trucks which bore the legend "not for hire" and the drivers of these trucks did not carry bills of lading and when they were stopped stated that they were operating for a private carrier. On these facts the Commission held that bad faith had been exercised and the operations were not *bona fide*. In the case of *A. E. McDonald Motor Freight Lines*, 21 M. C. C. 658, the Commission, following the decision of this court in case of *McDonald versus Thompson*, 305 U. S. 263, found that McDonald had been operating in defiance of the laws of the state of Texas and on the basis of such facts found that the operations were not *bona fide*. In the case of *Jay Rountree*, 22 M. C. C. 355, applicant did not hold state authority in the States of Texas and Arkansas, both of which States required the procurement of operating authority. Texas was enforcing its Act with respect to Interstate operators but the records showed that Arkansas was not enforcing its Act with respect to Interstate operations until sometime in 1939. On these facts the Commission found that the applicant was not in *bona fide* operation in the State of Texas but was in *bona fide* operation in the State of Arkansas because in Texas the carrier was operating in wilful violation of the Texas Act while in Arkansas the applicant was operating without concealment in violation of an Act which was not enforced against him. In the case of *Watson Brothers Transportation Co., Inc.*, 24 M. C. C. 679, the applicant held irregular route authority in the State of Iowa and was seeking authority from the Commission as a regular route operator. The Iowa Commission contended that the applicant was operating illegally in the State of Iowa and should have obtained regular route authority because of the increased frequency of the applicant's service. The Commission stated that while the appli-

cant may have conducted these operations without appropriate authority from the State of Iowa there was no evidence of evasion, deceit or defiance and the Commission therefore concluded that the operations were *bona fide*.

These principles for determining whether or not operations were *bona fide* in character were applied to the facts of record in the Fleming case. The Trial Examiner in determining this issue made reference to the Slagle case and then stated:

> "The true test of *bona fide* operation was held to be actual operation in the conduct of a legitimate transportation business for hire without subterfuge, deceit, or concealment. Applicant's operations fully meet the test of *bona fide* operation as laid down in the above cited case."
>
> *Trial Examiner A. E. Later's Report* (R. 75).

The Commission, by Division 5, also considered this issue and made a finding that the applicant had made inquiry as to certificate requirements of the various states and testified that to the best of his information certificates were not required with one or two exceptions, and pointed out that the applicant had offered in evidence receipts for taxes paid in various of the states. The Division then concluded that compliance by applicant with applicable laws of the states was a matter resting between the applicant and the state authorities (R. 14, 15).

F. No Erroneous Construction of the Act or Faulty Interpretation of Its Provisions Is Evident.

1. Grandfather cases warrant liberal interpretation of the expression "within the territory."

The obtaining of a certificate of Public Convenience and Necessity under the "Grandfather" clause of the Act upon mere compliance with procedural rules outlined by the Commission is a matter of right by the very terms and provisions of the Act. The receipt of authority coextensive with the operations conducted by an applicant on the statutory "Grandfather" date is a right conferred by Congressional Act and does not rest upon the grace of the Commission. The "Grandfather" clause was inserted in the Act for the protection of existing motor carriers and not out of any consideration of public convenience and necessity.

> "The purpose of the Act is regulatory, and we believe that the 'Grandfather' clause was included therein for the benefit of carriers who had been in *bona fide* operation on and prior to the 'Grandfather' date, rather than for the serving of public convenience."
>
> *Loving v. U. S.*, 32 F. Supp. 464.

It would be error for the Commission to so limit the authority granted to an applicant under the "Grandfather" clause of the Act as to deprive the applicant of some portion of the transportation service rendered on the statutory "Grandfather" date. In connection with such an attempt on the part of the Commission the United States District Court for the western district of North Carolina has said:

> "Being a common carrier of general freight during the 'Grandfather' period, it (the applicant) became entitled to a certificate on the same basis;

> and we see nothing in any language of the Act which justifies the Commission in limiting the certificate to the points served and the specific commodities transported. 'Grandfather' clauses are quite customary when the state first undertakes the regulation of an industry or profession; and so far as we are advised the position taken by the Commission with respect to these cases is quite without precedent. It is just as though a physician entitled to continue his practice under the 'Grandfather' clause of a statute regulating the practice of medicine should be told that he could practice only in the homes which he had formerly visited in his practice and would be allowed to treat only the diseases which he had formerly treated. We feel perfectly sure that if any such interpretation of the Act had been suggested at the time of its consideration by Congress, it would never have been passed."
>
> *Carolina Freight Carriers Corp. v. U. S.*, 38 F. Supp. 549.

In determining the scope of the territorial operations of an irregular route motor carrier seeking rights under the "grandfather" clause of the Act, the Commission should be liberal in its interpretation rather than narrow, because a narrow interpretation might deprive an applicant of rights granted to the applicant by act of Congress; while the most that a too liberal interpretation could result in would be to confront competitive transportation agencies with an additional degree of competition not theretofore experienced, which would present no legal damage, since competitive carriers, at least competitive motor carriers, have no right of monopoly in the conducting of transportation operations.

> "No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways."

Interstate Commerce Act, Part II, Sec. 207(b).
U. S. Code, Title 49, Sec. 307(b).

A similar degree of liberality should be exercised by the Commission in determining the question of *"bona fides"* because a narrow interpretation might deprive an applicant for "grandfather" rights of certain operating authority on the basis of non-compliance with the state regulatory law which might subsequently be determined invalid or inapplicable. In such event the injury would be irreparable. Particular care should be taken by the Commission not to make a determination that operations were unlawful where the Commission has before it no evidence that unlawfulness has been claimed by the State Commission and no evidence that proceedings have been instituted in the State to penalize the unlawfulness. In applying this argument to the Fleming case it should be noted that Fleming testified on cross examination that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a state regulatory law (R. 107).

2. The expression "territory" was not construed by the Commission to mean "states."

Appellants urged in the court below that the Commission had erroneously construed the expression "within the territory" to mean "within the states." No language used by the Commission in the Fleming case justifies such an argument and it would appear to be based upon an inference from the fact that the Commission, in fact, used state boundaries for the purpose of defining the grant of authority in the Fleming case. That the Commission did not use such a test and did not adopt the interpretation which Appellants attribute to it is evidenced by the fact that the Commission in its report discusses the question

of whether Fleming should receive state-wide authority although the evidence clearly shows that Fleming had served some point or points in each of the states covered by the grant of authority. If the Commission had adopted the interpretation attributed to it, its discussion of the problem in its report (R. 12, 13, 14) would have been a useless waste of time.

Further evidence that the Commission did not adopt the interpretation attributed to it can be found by reference to the Cassens case and Robertson case hereinbefore cited. In the Cassens case the applicant sought to serve the lower two-thirds of the State of Illinois and showed substantial service to many points in that state. The Commission confines the Cassens authority to service below a line drawn approximately twenty to forty (20 to 40) miles south of the northern boundary of the territory sought to be served by the applicant. If the Commission thought that the expression "within the territory" was the same as "within the states" it is unexplainable why the Commission did not grant Cassens the entire authority requested since the request involved less than a full state. On the other hand, in the Robertson case, the applicant sought to serve all points in the State of Arizona and the Commission discussed at some length whether to grant the northeastern portion of the State of Arizona in view of the fact that most of the service had been performed in other portions of the state. The Commission finally concluded that Robertson should receive state-wide authority. Here again the Commission could not possibly have adopted an interpretation which is attributed to it by Appellants.

It is submitted that the Commission did not grant Fleming territorial authority, state-wide in scope, on the basis of any erroneous interpretation of the meaning of the

expression "within the territory" but on the contrary determined that the nature of the specialized service performed by Fleming on the statutory "grandfather" date required a grant of authority to the extent covered in its order in order not to destroy the usefulness of Fleming's specialized service. Support for this position may clearly be found upon careful reading of the Commission's decision in the Fleming case (R. 13, 14, 16).

3. Lawfulness recognized as an element of a "bona fide operation."

Reviewing again briefly the Commission decisions which have been cited above in which the issue as to the *bona fide* character of operations has been raised, it is apparent that the Commission has not, in its interpretation of the phrase "*bona fide* operation," disregarded the question of lawfulness. On the contrary it would appear that the Commission recognized lawfulness or unlawfulness as an element to be considered in connection with the attitude of the carrier where that attitude could be determined from the facts of record. In the Slagle case, the Commission determined from the facts of record that Slagle was attempting to comply with all state regulatory laws and consequently although there may have been technical infraction or non-compliance, that Slagle's attitude was not defiant and therefore his operations were *bona fide*. In the Wartena case, violation of regulatory state laws, coupled with deliberate misrepresentations that the operations were not for hire, was found by the Commission to destroy the applicant's claim that the operations were *bona fide*. The Commission's decision in the McDonald case was in full conformity with the Supreme Court's decision to the effect that McDonald had been operating in defiance of the state authorities, and this attitude of

defiance, coupled with unlawfulness of the operation, destroyed the claim of *bona fides*. In the Fleming case the Commission also reached a determination based upon the facts of record that Fleming had made an effort to determine what regulatory laws applied to him and paid substantial taxes in a number of states. The Commission reasoned that Fleming's attitude was proper and that the question of technical compliance with state laws was a matter which rested between Fleming and the individual states (R. 14-15).

Had any of the state authorities in the states which Fleming was serving or through which Fleming was passing, desired to prohibit the use of their highways prior to the Commission's decision and based upon a claim that the operations were unlawful, the state authorities would have been at liberty to do so. *Eichholtz v. Public Service Commission*, 306 U. S. 268. It should be remembered that Fleming had testified that neither he nor his company nor any of his drivers had ever been arrested in any state for violating a state regulatory law (R. 107). This testimony was given by Fleming on July 23, 1936 (R. 83) although protests had already been filed in the case by the Texas regulatory body February 21, 1936 (R. 57); by the regulatory body of Missouri on May 21st, 1936 (R. 60); and by the Ohio regulatory body on April 14, 1936 (R. 61). The record will indicate that neither Texas nor Ohio pursued their respective protests and the application of the Missouri law has been considered hereinbefore. For the Commission to have determined that Fleming was in violation of applicable state laws, which would negative his claim that his operations were *bona fide*, the Commission would have been forced to reach such determination upon its own interpretation of the state laws, without any prior determination by either the courts or the regulatory bodies of the respective states.

It has been urged that this court in its decision in *McDonald v. Thompson*, 305 U. S. 263, in effect questioned the validity of the Commission's determination in the Slagle case. We do not believe that this court's decision is subject to such construction. It is to be noted that in the McDonald case this court in interpreting the expression "*bona fide* operation" as used in the Act, said:

> "To limit the meaning to mere physical operation would be to eliminate '*bona fide*.' That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208, *Ex Parte Public Bank*, 278 U. S. 101, 104. There is nothing to justify rejection of these qualifying words. The expression 'in *bona fide* operation,' suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the proviso does not extend to one operating as a common carrier on public highways of a state in defiance of its laws."
>
> *McDonald v. Thompson*, 305 U. S. 263.

We interpret this language to mean that mere physical operation alone does not constitute a *bona fide* operation if the facts of record disclose a defiant non-recognition of the power of a state to withhold or condition the use of its highways. We further construe the language to mean that mere recognition of state regulatory laws and compliance therewith does not constitute a *bona fide* operation if there is a mere holding out of a potential service or a simulated service. Assuming this interpretation to be

correct, we believe that this court has set up the same standard as that set up and observed by the Commission in the Slagle case and followed in the Fleming case, namely that all of the facts of record must be taken into consideration, lawfulness of the operation being but one of the elements for consideration. Neither Slagle nor Fleming evidenced a defiant attitude toward state authority or conducted themselves as though they failed to recognize the power of a state to withhold or condition the use of its highways. We submit that a contrary decision by the Commission in the Slagle and Fleming cases would be in violation of this court's decision in the *McDonald v. Thompson* case.

G. A Full, Fair and Impartial Hearing Was Afforded.

In the Fleming case, application was filed by Fleming within the time limited in the Act, seeking operating authority under the provisions of the "grandfather clause" of the Act (R. 44). Public hearing on this application was held July 23, 1936, at which counsel for Appellants appeared and participated in the examination of witnesses (R. 83). After this public hearing briefs were filed by various parties to the proceeding (R. 69) and under date of September 10, 1937, a detailed and extensive report and recommended order was issued by the Commission's Trial Examiner setting forth many findings of fact and conclusions of law (R. 68). To this report and recommended order exceptions were filed on behalf of most of the Appellant carriers (R. 78).

Presumptively the Commission gave careful consideration to the application, the testimony of record, the Examiner's report, the Briefs filed in the case and the Exceptions filed in the case. On December 19, 1938, the Commission by Division 5 entered its determination in a

detailed report and order containing many findings (R. 8). The Commission's order confirmed in most essential details the Trial Examiner's report and recommended order. Two petitions for reargument were filed on behalf of rail carrier protestants most of whom are Appellants in this action, which petitions were considered and denied by the Interstate Commerce Commission (R. 79; also Appellants' statement of case, page 4 of appellants' brief).

In view of the foregoing it should be apparent that the Commission did not act arbitrarily or capriciously or with undue haste in entering its decision in the Fleming case. It is equally apparent that the Commission had before it in briefs, exceptions, and petitions for reconsideration, all vital issues for determination. No claim can now be made that the Commission did not have before it and pass upon all elements necessary for a proper disposition of the case, and under these circumstances, we submit that the administrative findings of the Commission should not now be disturbed.

II.

THE DISTRICT COURT DECREE, INSOFAR AS IT ADOPTS THE FINDINGS AND AFFIRMS THE CONCLUSIONS OF THE COMMISSION, CONSTITUTED FULL JUDICIAL REVIEW OF THE ADMINISTRATIVE ACTION IN SOUND CONFORMITY WITH ESTABLISHED PRINCIPLES OF ADMINISTRATIVE LAW

A. Full Judicial Review of the Administrative Action Was Afforded.

Following the Interstate Commerce Commission's denial of two petitions filed on behalf of all but four of the Appellants seeking reconsideration of the Commission's order of September 19, 1938, in the Fleming case, Appellants sought judicial review of the Commission's administrative action through the filing of a detailed and informative Bill of Complaint under the appropriate provisions of law providing for such review, namely, 28 U. S. C. 41 (28) (R. 1). To this Complaint answer was made by the United States (R. 22), by the Interstate Commerce Commission (R. 26) and by the individual John P. Fleming (R. 18).

In due course of time a special constituted District Court of Three Judges composed of the Honorable Charles C. Simons, United States Circuit Judge; Honorable Edward J. Moinet, United States District Judge, and Honorable Frank A. Picard, United States District Judge, was convened pursuant to Sec. 47, Title 28, U. S. C. A. on the 26th day of November, 1940, at Detroit, Michigan, and hearing was had. The hearing was participated in by counsel representing the railroad Appellants, the United States, the Interstate Commerce Commission, and the individual John P. Fleming. Full opportunity was afforded to and utilized by counsel for all parties to the

proceeding to present the issues in the case and their arguments in connection therewith. Following the hearing, and pursuant to leave granted by the court, briefs were filed by all parties to the proceeding, further outlining the position of each party.

On January 31, 1941, after several weeks deliberation, the District Court rendered and filed its opinion (R. 29). This opinion sets forth in some detail the positions of the parties, the findings of the District Court, and the District Court's ultimate conclusions to the effect that the Commission's order in the Fleming case, except as modified to some slight degree, should be affirmed. Judgment and decree was entered by the Court April 7, 1941 (R. 36).

Thus it will be observed that Appellants have been afforded full judicial review of the Commission's administrative action as provided by Congressional statute. The principle question then before this Honorable Court would seem to be the matter of determining whether error was committed by the District Court in its judicial review of the Interstate Commerce Commission's administrative action.

B. Validity of the Commission's Action, Except as Modified, Was Affirmed.

A determination of whether or not the District Court committed error in its judicial review of the Commission's administrative action first requires an examination of the Court's opinion to ascertain the basis for its subsequent decree. The court in its opinion first makes reference to the statutes under which the action was commenced, then identified the parties to the proceeding, and follows with a short review of the administrative action to be reviewed. The first issue to be discussed by the court involved the question of whether the railroad Appellants were parties

in interest to maintain the suit and the Court found affirmatively on that issue.

The court, in its opinion, next makes reference to the provisions of the Interstate Commerce Act, Part II, and in particular the provisions of the "grandfather clause"; sets forth Appellants' contentions as to the error allegedly committed by the Commission in its interpretation and application of such language; and reviews the findings of the Commission. Among the findings of the Commission which are repeated by the court and ultimately adopted as its own are the following:

(1) Fleming had commenced operations during the early part of 1933, from which time to July, 1936, he had transported or participated in the transportation of more than 2100 vehicles (R. 32).

(2) He had also transported used cars between various points in the states covered by his application (R. 32).

(3) In each of the states, save one, in which deliveries are authorized by the Order, there had been shipments prior to the crucial date, June 1, 1935, and shipments thereafter prior to the date of the hearing (R. 32).

(4) As to many of the states, the applicant had transported numerous shipments to the points served (R. 32).

(5) Fleming was engaged in a highly specialized transportation service with few direct competitors, and but 7% of all new automobiles sold in twenty-four western states were being transported by the method in which the applicant was engaged (R. 32).

(6) Distribution points are constantly being shifted from the standpoint of a state-wide area; dealers' accounts are frequently changed; sales volume at given points may show rapid increases or decreases (R. 33).

(7) The result of a shift in distribution point would leave the applicant without authority to serve an account theretofore served, and render the carrier unable to continue an operation which he had been conducting (R. 33).

(8) The applicant's operations had been and would continue to be irregular in nature because of the conditions under which he might secure traffic (R. 33).

(9) Fleming had made inquiry as to certain state requirements, some of which were still pending at the time of the hearing (R. 34).

(10) Receipts for taxes were introduced and Fleming held permits in some states (R. 34).

(11) In a few of the states, notably, Missouri, there may have been temporary, inadvertent, or purely technical operation without sanction of local law (R. 34).

In addition to the court's acceptance and adoption of the Commission's findings of fact, it is apparent that the court made an independent review of the record because the court itself made additional findings of fact independent of the Commission's findings. For example, the court found:

(1) The statute neither expressly nor by implication gives connotation to the phrase "within the territory" (R. 33).

(2) No standard is found whereby the area is to be delimited, and Appellants have been unable to suggest criteria by which the Commission must be governed (R. 33).

(3) It is general knowledge that in many industries distribution points are determined for areas coextensive with state boundaries (R. 33).

(4) The Commission had made exhaustive studies of motor carrier transportation service and it must be assumed it has become expert in that field (R. 33).

(5) Fleming's operations were in recognition of state law (R. 35).

(6) There is no evidence that Fleming's inquiries were not pursued in good faith or that he had been excluded from any state by local administrative authority (R. 35).

Further evidence that the court carefully reviewed the record in the light of established principles of administrative law is indicated by the fact that the court reached certain conclusions and discussed its conclusions with reference to judicial determinations which have been made in connection with similar issues. This phase will be discussed in the next division of our brief.

C. Established Principles of Administrative Law Were Observed.

1. Much weight should be given to the Commission's construction of the Act.

In construing the language used in the "grandfather clause" of the Act the District Court concluded that "decision upon the substantial character of the applicant's business must be considered as having been committed to the judgment of the administrative agency entrusted by the Act with regulation and enforcement" (R. 32). The District Court's conclusion finds support in the decision of this court in *United States v. Maher,* 307 U. S. 148. The District Court made a finding that the Commission had made exhaustive studies of motor carrier transportation services and that it must be assumed the Commission has become expert in that field (R. 33). Based upon this

finding the District Court apparently felt that the findings of the Commission were entitled to great weight and support for this position is also to be found in the adjudicated cases. Peculiar weight is to be given to administrative interpretation of legislation

> "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."
>
> *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315.
>
> *United States v. American Trucking Associations Inc.*, 60 S. Ct. 1059.
>
> *Loving v. United States*, 32 F. Supp. 464.

2. The Commission's findings of fact should be conclusive.

The District Court cites *United States v. Maher, supra*, as authority for the conclusion that the determination of "*bona fide* operation" is a question of fact (R. 34). The District Court had previously concluded that the determination of territorial scope of the operations was also a question of fact as we have above indicated. The District Court then stated: "In our application of the now familiar rules governing review of factual findings by administrative bodies, we are unable to see that the findings of the Commission are unsupported by substantial evidence, and in this respect they will be sustained except as to operation in the State of Arkansas" (R. 32, 33). The familiar rules to which the District Court referred have been established by a number of cases including the following:

> *Virginia Railway Co. v. United States*, 272 U. S. 658, 663.

Western Paper Makers Chemical Co. v. United States, 271 U. S. 268.

Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541.

The New England Divisions Case, 261 U. S. 184.

3. The judicial function is exhausted when a rational basis for the Commission's conclusion is found.

The Commission's basis for granting Fleming authority to serve all points in a state, although actual operation had been limited to only certain fixed distribution points in each state, is discussed by the District Court in some detail in its opinion (R. 33). It is evident that the District Court reviewed the record carefully to determine whether the basis used by the Commission was rational because it did not affirm completely the findings of the Commission but in fact determined that the Commission had committed error in granting Fleming authority to serve all points in the State of Arkansas. The District Court's adoption of the Commission's findings with respect to all other states embraced in the grant of authority indicates that the District Court believed the Commission had found a rational basis for its order.

The judicial function is exhausted when there is found to be a rational basis for the conclusions adopted by the administrative body.

Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282.

4. It is not the function of the Court to substitute its judgment for that of the Commission.

The District Court having found a substantial basis for the Commission's decision, with no error being indicated except with reference to the grant of authority to serve the State of Arkansas, the District Court was correct in not attempting to substitute its judgment for that of the Commission. The District Court pointed out in its opinion that the Act did not define the meaning of the phrase "within the territory." It further pointed out that no standard is found whereby the area is to be delimited and Appellants have been unable to suggest criteria by which the Commission must be governed (R. 33). In this connection, it should be noted that Appellants, in the lower court and here, admit that the Commission's order was correct in some respects but urge that the Commission went too far in granting territorial authority. This court has said

> "The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the Court."
>
> *The Los Angeles Switching Case*, 234 U. S. 294, 314.

5. A contrary ruling would establish a precedent for judicial review of all "grandfather" orders.

It should be fairly obvious that a large majority of cases involving a determination of "grandfather clause" applications under the Act would impose upon some person or body the very difficult task, not only of interpreting the Act, but also of reviewing all the evidence in each case to determine the exact geographical or territorial extent of operations conducted by an applicant over a considerable period of time both before and after the statutory "grandfather" date, which in turn would require determination of whether such operations were *bona fide* in character. The question then naturally arises as to who shall make such determination and by what standards. The Commission's Trial Examiner in the Fleming case undertook such determination and his determination was, in substantial measure, affirmed by the Commission through Division 5. The Appellants, being dissatisfied with such determination by the Commission sought through exceptions and petitions for reconsideration to substitute Appellants' judgment for that of the Commission. Failing in this, Appellants have sought to substitute the judgment of the United States District Court for that of the Commission's. Again Appellants have failed except for the minor modification hereinbefore indicated.

We submit that a contrary position on the part of the District Court would have opened the door for review of a vast majority of "grandfather clause" cases under the Act which would have handicapped seriously the administration of the Act and would have imposed an intolerable burden upon the courts. Thirty-five years ago this court had occasion to review some administrative action taken by the Interstate Commerce Commission and the court said:

"Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief:

'I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court.'

To what, then, shall we resort? How shall we determine what 'principles of transportation law' were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648; *East Tenn. etc. Railroad Co. v. Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission which, in addition to 'knowledge of conditions, of environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the Circuit Court."

Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441, 454.

Here also the question might be asked, "to what shall the court resort?" The Act directed the Commission to grant operating authority to applicants for "grandfather" rights which would cover the *bona fide* operations conducted by such applicant on the statutory grandfather date June 1, 1935. The Act does not establish the standard for determining the territorial scope of such authority. Shall such determination be made by the Commission or by the courts? In particular, where the Commission has made a determination and the specially constituted District Court of Three Judges has examined such determination, shall the Supreme Court reject such determination, as reinforced by the concurrent judgment of the District Court, and redetermine the matter?

Unless judicial review is limited to the testing of the validity of the Commission's order upon the evidence which was before the Commission at the time of its hearing, the Commission will become a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

> *United States v. Louisville & Nashville Railroad Co.*, 235 U. S. 314.
>
> *Noeding Trucking Company v. United States*, 29 F. Supp. 537.

We do not believe that the Supreme Court of the United States wishes to reduce the Interstate Commerce Commission to the status of a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action, nor do we believe that the Supreme Court of the United States wishes to take upon itself or to impose upon the District Courts the burden of determining the exact extent of interstate motor carrier transportation as it was conducted on June 1, 1935.

CONCLUSION

The District Court, after full judicial review of the administrative action of the Interstate Commerce Commission has reached a determination that the Commission's action in the Fleming case was valid, except as modified, and has concluded that it should not substitute its judgment for that of the administrative body. Based upon the precedents of this Honorable Court, we respectfully submit that the District Court's position should be approved by this Honorable Court's affirmance of the District Court decree.

Respectfully submitted,

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